

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

WAREHOUSE 51, LLC,)	
)	
Appellant,)	CASE NO. 03C-49
)	
vs.)	
)	FINDINGS AND FINAL ORDER
DOUGLAS COUNTY BOARD OF)	DISMISSING APPEAL AT THE
EQUALIZATION,)	CLOSE OF THE TAXPAYER'S CASE
)	
Appellee.)	

Appearances:

For the Appellant: Richard P. Jeffries, Esq.
Kutak Rock, LP
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Omaha, NE 68102

For the Appellee: James R. Thibodeau, Esq.
Deputy Douglas County Attorney
909 Civic Center
Omaha, NE 68183

Before: Commissioners Hans, Lore, Reynolds, and Wickersham.

**I.
STATEMENT OF THE CASE**

Warehouse 51, LLC, ("the Taxpayer") owns a 13.50 acre tract of land legally described as Lot 1, Seaton Industrial Park, Douglas County, Nebraska. (E5:7). The tract of land is improved with a 152,559 square foot commercial distribution warehouse with 4 shipping and 4 receiving docks built in 2002. (E5:5).

The Douglas County Assessor ("the Assessor") determined that the subject property's actual or fair market value was \$5,266,100 as of the January 1, 2003, assessment date. (E1). The Taxpayer timely filed a protest of that determination and alleged that the

subject property's actual or fair market value was \$4,306,700 as of the assessment date. (E12). The Douglas County Board of Equalization ("the Board") denied the protest. (E1).

The Taxpayer appealed the Board's decision on August 18, 2003. The Commission served a Notice in Lieu of Summons on the Board on September 3, 2003, which the Board answered on September 10, 2003. The Commission issued an Order for Hearing and Notice of Hearing to each of the Parties on June 9, 2004. An Affidavit of Service in the Commission's records establishes that a copy of the Order and Notice was served on each of the Parties.

The Commission called the case for a hearing on the merits of the appeal in the City of Lincoln, Lancaster County, Nebraska, on October 20, 2004. The Taxpayer appeared at the hearing through Scott Seaton, a Member of the Warehouse 51, LLC. The Taxpayer also appeared through counsel, Richard P. Jeffries, Esq.. The Board also appeared through counsel, James R. Thibodeau, the Deputy Douglas County Attorney. Commissioners Hans, Lore, Reynolds and Wickersham heard the appeal. Commissioner Reynolds served as the presiding officer.

The Commission afforded each of the Parties the opportunity to present evidence and argument. The Board moved to dismiss the appeal at the close of the Taxpayer's case-in-chief for failure to overcome the statutory presumption, and specifically for failure to adduce any evidence of actual or fair market value.

II. ISSUES

The issues before the Commission are (1) whether the Board's decision to deny the Taxpayer's equalization protest was incorrect and either unreasonable or arbitrary; and (2) if so, whether the Board's determination of value was unreasonable.

III. APPLICABLE LAW

The Taxpayer is required to demonstrate by clear and convincing evidence (1) that the Board's decision was incorrect and (2) that the Board's decision was unreasonable or arbitrary. (Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B.973, §51)). The "unreasonable or arbitrary" element requires clear and convincing evidence that the Board either (1) failed to faithfully perform its official duties; or (2) failed to act upon sufficient competent evidence in making its decision. The Taxpayer, once this initial burden has been satisfied, must then demonstrate by clear and convincing evidence that the Board's value was unreasonable. *Garvey Elevators v. Adams County Bd.*, 261 Neb. 130, 136, 621 N.W.2d 518, 523-524 (2001).

IV.
FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer adduced no evidence of actual or fair market value for the subject property.
2. The Taxpayer adduced no evidence of the adjustments necessary to account for differences between the subject property and the other "comparable" properties.
3. The Taxpayer adduced no evidence of actual or fair market value for its "comparable" properties.

V.
ANALYSIS

The Taxpayer's only evidence of actual or fair market value as of the assessment date is in the form of values stated on the Property Record Cards for properties it deems comparable to the subject property. The Taxpayer offered testimony that it based its requested value of \$4,306,700 (E13) on the assessed value of the property described in Exhibit 8. However, when the square footage of the subject property's improvements, 152,559 square feet (E13) is multiplied by the per square foot assessed value of the "comparable" property, \$25.62 (E13), the result is \$3,908,561. Adding that value to the value of the land component, which is not disputed (\$121,500), results in a value of \$4,030,062. Nothing in the record explains the difference

between the requested value of \$4,306,700 and the value indicated using the offered calculation, \$4,030,062.

The Taxpayer contends that the assessed value of the property described in Exhibit 8 is evidence of the actual or fair market value of the subject property as of the assessment date. "Comparing assessed values of other properties with the subject property to determine actual value has the same inherent weakness as comparing sales of other properties with the subject property. The properties must be truly comparable." *DeBruce Grain, Inc. v. Otoe County Bd. of Equalization*, 7 Neb. App. 688, 697, 584 N.W.2d 837, 843 (1998).

"Comparable properties" share similar quality, architectural attractiveness (style), age, size, amenities, functional utility, and physical condition. *Property Assessment Valuation*, 2nd Ed., International Association of Assessing Officers, 1996, p. 98. When using "comparables" to determine value, similarities and differences between the subject property and the comparables must be recognized. *Property Assessment Valuation*, 2nd Ed., 1996, p.103. "Financing terms, market conditions, location, and physical characteristics are items that must be considered when making adjustments . . . " *Property Assessment Valuation*, 2nd Ed., 1996, p. 98. Most adjustments are for physical characteristics. *Property Assessment Valuation*, 2nd Ed., 1996, p.105. The subject property differs from the property described

in Exhibit 8 in terms of age, land size, building size, ceiling height, and quality of construction. (E5:8; E8:1; E13). The subject property has as its only Heating, Ventilation and Cooling System ("HVAC") a space heater. (E5:9). The property described in Exhibit 8 has a complete HVAC system. (E8:2). The Taxpayer adduced no evidence of the adjustments necessary to render the property described in Exhibit 8, or any of the other properties offered as comparables, truly comparable to the subject property.

The Parties stipulated that the property described in Exhibits 8 and 9 are "comparable" to the subject property. Ordinarily, a stipulation entered by the parties to a proceeding or by their attorneys within the scope of authority for representation of the parties, establishes the fact or facts stipulated and binds the parties. The Courts have conclusively held, however, that a stipulation does not deprive the finder of fact of its ability to weigh the evidence. In fact, a stipulation leaves the factfinder free to consider the weight and credibility which must be accorded the stipulated evidence in the same manner as the factfinder would weigh any other evidence. *Ehlers v. Perry*, 242 Neb. 208, 217, 494 N.W.2d 325, 333 (1993); *Schneider v. Chavez-Munoz*, 9 Neb.App. 579, 594, 616 N.W.2d 46,57 (2000). The record does not establish that the properties described in Exhibits 8 or 9 are truly comparable to the subject

properties for purposes of establishing value or a lack of equalization.

The Taxpayer adduced no evidence of actual or fair market value for any of the properties described in Exhibits 2, 3, 4, 8, 9, or 10. The Taxpayer alleges that evidence of actual or fair market value is not necessary under the holding of *Scribante v. Douglas County*, 8 Neb.App. 25, 588 N.W.2d 190, (1998). The Court's holding in *Scribante* concerned different facts. The Parties in that appeal stipulated as to the actual or fair market value of the subject property, \$1,305,000. There is no stipulation here as to actual or fair market value, and there is no evidence as to actual or fair market value of the subject property or any offered comparable. Under these circumstances a different holding applies. "The right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. This conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 304, 344

N.W.2d 620, 626 (1984). There is no evidence that the subject property's assessed value is 100% of actual or fair market value.

In the absence of evidence of actual or fair market value, there is no evidence the Board's decision concerning the Taxpayer's equalization protest was incorrect, unreasonable or arbitrary. A taxpayer who offers no evidence that the subject property is valued in excess of its actual value and who only produces evidence that is aimed at discrediting valuation methods utilized by the county assessor fails to meet his or her burden of proving that value of the property was not fairly and proportionately equalized or that valuation placed upon the property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and over the subject matter of this appeal.
2. The Commission is required to affirm the decision of the Board unless evidence is adduced establishing that the Board's action was incorrect and either unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B.973, §51).

3. The Board is presumed to have faithfully performed its official duties in determining the actual or fair market value of the property. The Board is also presumed to have acted upon sufficient competent evidence to justify its decision. These presumptions remain until the Taxpayer presents competent evidence to the contrary. If the presumption is extinguished the reasonableness of the Board's value becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests on the Taxpayer. *Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 130, 136, 621 N.W.2d 518, 523 (2001).
4. "Actual value" is defined as the market value of real property in the ordinary course of trade, or the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's-length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. Neb. Rev. Stat. §77-112 (Reissue 2003).
5. The Taxpayer has failed to adduce any evidence that the Board's decision was incorrect and either unreasonable or arbitrary.

6. The Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was [incorrect and either] unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 168, 580 N.W.2d 561, 566 (1998); Neb. Rev. Stat. §77-5016(7) (Reissue 2003).
7. The Board's Motion to Dismiss must accordingly be granted.

**VII.
ORDER**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Board's Motion to Dismiss is granted.
2. The Taxpayer's real property legally described as Lot 1, Seaton Industrial Park, Douglas County, Nebraska, more commonly known as 7405 Irvington Road, shall be valued as follows for tax year 2003, as determined by the Board:

Land	\$ 121,500
Improvements	\$5,144,600
Total	\$5,266,100
3. Any request for relief by any Party not specifically granted by this order is denied.
4. This decision, if no appeal is filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5016(7) (Reissue 2003, as amended by 2004 Neb. Laws, L.B.973, §51).

5. This decision shall only be applicable to tax year 2003.
6. Each Party is to bear its own costs in this matter.

IT IS SO ORDERED.

I certify that Commissioner Lore, Commissioner Reynolds and I made and entered the above and foregoing Findings and Order in this appeal on the 20th day of October, 2004. Commissioner Hans dissented and would have granted the relief requested. The Findings and Order, having been approved and confirmed by a quorum of the Commission are deemed to be the Order of the Commission pursuant to Neb. Rev. Stat. §77-5005(5) (Reissue 2003).

Signed and sealed this 21st day of October, 2004.

SEAL

Wm. R. Wickersham, Chair